

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CASE NO. 5:09cv359/RS-MD

**EVELYN JOHNSTON,
BLAINE JOHNSTON, and
ABACO EXECUTIVE SERVICES,
INC.,**

Defendants.

ORDER

Before me is Plaintiff's motion for summary judgment (Doc. 58).

I. STANDARD OF REVIEW

The basic issue before the court on a motion for summary judgment is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251, 106 S. Ct. 2505, 2512 (1986). The moving party has the burden of showing the absence of a genuine issue as to any material fact, and in deciding whether the movant has met this burden, the court must view the movant's evidence and all factual inferences arising from it in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398

U.S. 144 (1970); *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115 (11th Cir. 1993). Thus, if reasonable minds could differ on the inferences arising from undisputed facts, then a court should deny summary judgment. *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1534 (11th Cir. 1992) (citing *Mercantile Bank & Trust v. Fidelity & Deposit Co.*, 750 F.2d 838, 841 (11th Cir. 1985)). However, a mere ‘scintilla’ of evidence supporting the nonmoving party's position will not suffice; there must be enough of a showing that the jury could reasonably find for that party. *Walker v. Darby*, 911 F.2d 1573, 1577 (11th Cir. 1990) (citing *Anderson*, 477 U.S. at 251).

II. BACKGROUND

I accept the facts in the light most favorable to Defendants. *See Galvez v. Bruce*, 552 F.3d 1238, 1239 (11th Cir. 2008) (citing *Vinyard v. Wilson*, 311 F.3d 1340, 1343 n.1 (11th Cir. 2002)). “All reasonable doubts about the facts should be resolved in favor of the non-movant.” *Id.* (quoting *Burton v. City of Belle Glade*, 178 F.3d 1175, 1187 (11th Cir. 1999); *Clemons v. Dougherty County*, 684 F.2d 1365, 1368-69 (11th Cir. 1982).

Defendants did not file a statement of facts as required by N.D. Fla. Loc. R. 56.1. Pursuant to Rule 56.1 “all material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be filed and served by the opposing party.” Great

deference is given to a district court's interpretation of its local rules, and will only be reviewed for an abuse of discretion. *Mann v. Taser Intern. Inc.*, 588 F. 3d 1291, 1302 (11th Cir. 2009). Therefore, all the facts in Plaintiff's statement of facts are deemed admitted by Defendants.

Defendant Evelyn Johnston is a professional tax preparer who does business in Panama City, Florida, and Fort Lauderdale, Florida. She owns and manages Defendant Corporation Abaco Executive Services, Inc. ("Abaco"), a corporate tax preparation firm with offices in both Panama City and Fort Lauderdale. She holds herself out as the President of Abaco. Defendant Evelyn Johnston is knowledgeable and experienced in tax preparation. She has been preparing federal income tax returns and tax-related documents for over 25 years and is an enrolled agent with the IRS, taking annual tax classes to satisfy IRS education requirements.

Defendant Blaine Johnston is works at Abaco preparing tax returns and tax-related forms for customers. He has been preparing tax returns and tax-related documents for over 20 years.

The Internal Revenue Service ("IRS") has identified 92 federal tax returns or amended returns prepared or filed by Defendants claiming large fraudulent tax refunds. Defendants improperly used IRS Form 1099-OID to report false OID

income and fabricate federal income tax withholding to support falsified refund requests.

Specifically, Defendants fraudulently claimed that their customers were entitled to refunds due to income tax purportedly withheld from customers by their creditors. Defendants then prepared federal income tax returns reporting phony income tax withholding based on the amount of their customer's debt to creditors, instead of the amount actually withheld from their customers' income. The grossly inflated amount of income tax withholding that Defendants reported on their customers' Forms 1040 and 1040X became the basis for their fraudulent tax refund claims. Some of these claims exceeded \$1 million, and some refunds were erroneously issued by the IRS. All of the transactions in the tax returns at issue were fabricated and never actually occurred.

Defendants' tax fraud scheme was based on a theory subscribed to by Defendants known as the "redemption theory." Subscribers to this theory believe that the government maintains secret accounts of money for each citizen, which can be accessed by preparing and filing certain tax documents. Defendants kept instructions in their offices explaining how to perform this scheme by completing the OID-related tax forms and filing them with the IRS. Defendants also kept in their offices frivolous OID-related form letters for OID customers to mail to the IRS in defense of OID-related filings.

Defendants orchestrated the fraudulent tax scheme at Abaco, preparing and filing false OID forms, directing their employee Gary Watson to assist in the scheme, coordinating with customer recruiters, and directly communicating with OID customers. Blaine Johnson specifically instructed Watson to prepare approximately 100 IRS Forms 1099-OID based upon information Johnston provided to Watson. After Watson prepared the forms, Blaine Johnston reviewed the completed forms and directed Watson to file them with the IRS, which Watson did. Blaine or Evelyn Johnston always reviewed, signed, and/or filed the false OID returns and forms that Watson prepared at their direction.

In 2009, Defendants were warned about their unlawful OID tax scheme, but they continued to prepare and file OID returns. Their employee, Watson, also confronted Defendants about the false OID returns and forms, but Evelyn Johnston insisted that their completion of the forms was proper because it was based on information her customers gave her and that she was not required to verify the information.

On October 27, 2009, IRS Agents executed a search warrant at Defendants' offices in Panama City Florida. IRS agents interviewed Defendants Evelyn and Blaine Johnston at the Abaco office in Panama City. During the interview, Evelyn and Blaine Johnston admitted that they and their company had been filing the false tax forms.

The Government has identified a number of fraudulent tax returns prepared by Evelyn Johnston, including returns for customers Sonia Florez, Caridad Marquez, Jairo Delgado, and for herself and her husband. The Government has identified a number of fraudulent tax returns prepared by Blaine Johnston, including returns for customers Eric Hamilton, Christian Oesch, and Becky Oesch.

The Government has moved for summary judgment, seeking to permanently enjoin all Defendants from any further tax return preparation.

III. ANALYSIS

Under 26 U.S.C. § 7407(b)(1), courts may enjoin a tax return preparer that has:

- (A) engaged in any conduct subject to penalty under section 6694 or 6695, or subject to any criminal penalty provided by this title,
- (B) misrepresented his eligibility to practice before the Internal Revenue Service, or otherwise misrepresented his experience or education as a tax return prepare,
- (C) guaranteed the payment of any tax refund or the allowance of any tax credit, or
- (D) engaged in any other fraudulent or deceptive conduct which substantially interferes with the proper administration of the Internal Revenue laws.

The Government must also show that injunctive relief is appropriate to prevent the recurrence of such conduct. 26 U.S.C. § 7407(b)(2). Thus, there are three elements the Government must prove to enjoin Defendants under § 7407: (1) Defendants are tax return preparers, (2) Defendants' conduct falls within one of the four areas of proscribed conduct; and (3) an injunction is appropriate to prevent

recurrence of the proscribed conduct. Because an injunction is statutorily authorized, I need only consider the factors set forth in the statute and not the traditional equitable requirements for an injunction.

There is no dispute that Defendants are tax return preparers; thus, the first element is satisfied. As for the second element, the Government contends that Defendants violated 26 U.S.C. § 7407(b)(1)(A) by engaging in conduct subject to penalty under section 6694 or 6695. Defendants have not disputed they filed the fraudulent tax forms or participated in the scheme. Therefore, the second element is also satisfied. The only dispute that remains is over the third element: whether an injunction is appropriate to prevent recurrence of the proscribed conduct.

Although since the filing of this case Defendants have not engaged in further filing of fraudulent 1099-OID forms, their participation in this scheme prior to this case is overwhelming. The IRS has identified 92 fraudulent 1099-OID tax forms that were filed over an extended period of time. That Defendants have ceased illegal conduct while under investigation holds little weight. Their conduct prior to this lawsuit was steadily recurrent and caused the IRS to erroneously issue large tax returns. There was and is great potential for harm to the Government from Defendants' filing of the fraudulent 1099-OID forms, and therefore Defendants are permanently enjoined from the filing of fraudulent 1099-OID forms.

However, the Government seeks to enjoin Defendants from *all* tax return preparation. This is greater than necessary to prevent the potential harm caused by the filing of fraudulent 1099-OID forms. Although Defendants were twice found in contempt for violating the parties' agreed upon preliminary injunction, none of those violations dealt with 1099-OID forms. In addition, none of the violations of the preliminary injunction were alleged or confirmed to be fraudulent tax form filings. The Defendants simply failed to submit tax returns to the monitor prior to filing them with the IRS, as required by the preliminary injunction. Furthermore, the Government has failed at any point to show a danger of harm from Defendants filing other tax forms, aside from the 1099-OID form. Therefore, Defendants are only enjoined as to the preparation of fraudulent 1099-OID forms. It is within a district court's discretion to decline to issue a broader injunction requested by the Government when it concludes that a limited injunction will be effective at preventing future violations. *United States v. Cruz*, --- F.3d ----, 2010 WL 2789253 *6 (11th Cir. 2010).

IV. CONCLUSION

IT IS ORDERED:

1. Plaintiff's motion for summary judgment is **granted**.
2. All Defendants are permanently enjoined from the filing of fraudulent IRS Forms 1099-OID. However, Defendants are permitted to

continue to file non-fraudulent IRS tax forms, including non-fraudulent 1099-OID forms.

3. The Clerk is directed to close the file.

ORDERED on August 4, 2010.

/s/ Richard Smoak
RICHARD SMOAK
UNITED STATES DISTRICT JUDGE